No. 14714

# In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

*v.*

AHTANUM IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION*

## REPLY OF THE UNITED STATES OF AMERICA TO BRIEF OF INTERVENING APPELLEE, STATE OF WASHINGTON

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### FOREWORD

Answer has been made by the United States of America in its reply brief to the Appellees to virtually every point presented by the brief of Intervening Appellee. Brief reply, however, to some of the issues presented or ignored by Intervener will be made.

### I. The United States of America seeks only to have its rights in Ahtanum Creek quieted—not to deprive anyone of his rights

It is admitted by Intervening Appellee that "the treaty of 1855" reserved "some waters of the Ah-

tanum Creek."[1] In the light of that admission the question is presented: What is the basis then for the judgment of dismissal—how may it be justified?[2]

Intervener offers no authority to support that judgment of dismissal, asserting, however, in some manner the United States of America seeks to deprive the landowners north of Ahtanum Creek of their rights. That statement is incorrect. All that the United States of America proposed—adhering strictly to law and equity—is to afford the Yakima Tribe of Indians their day in court, testing the title of the respective parties to the invaluable rights in Ahtanum Creek. Certainly the State of Washington as Intervener would have no objection to that orderly procedure.

**II. Intervener cites no authority in support of its contention that subordinate officials of the Department of the Interior by signing the alleged agreement of 1908 could give away invaluable rights to the use of water to settle private litigation[3]**

Affirmative testimony by one of the lawyers for defendants below discloses that the alleged agreement of 1908 was in settlement of the case of *Munn* v. *Redman*.[4] That suit was not against the United States of America. Neither Appellees nor Intervener offer a scintilla of authority which would support

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[1] Brief of Intervening Appellee, page 6.

[2] Please refer to Reply Brief for the United States of America, Part III in which Appellees' admissions are discussed.

[3] Brief of Intervening Appellee, State of Washington, pages 7–12, 15–18.

[4] Please refer to Reply Brief for the United States of America, Part IV, disclosing Invalidity of alleged agreement of 1908.

granting away 75% of the water of Ahtanum Creek, thus invading the rights of the Indians, in settlement of that private litigation. It is respectfully submitted, their position may not be supported.

### III. Unconscionable waste of water from Ahtanum Creek by appellees belies intervener's complaint of water shortage

Waste of water was proved by the United States of America;[5] wasteful practices, diversions without controls admitted by Appellees[6] yet Intervener complains of a shortage of water.[7] In the semiarid West the waste of water may not be tolerated. However, the unchallenged record discloses that Appellees have wasted and continue to waste the invaluable and admittedly short supply of water of Ahtanum Creek. Unless and until the Appellees prove that they are husbanding the water available to them rather than wasting it; are applying it in a manner requiring the highest duty, they are in a poor position to complain about a water shortage.

Rather than dismissing the complaint and cause, it is respectfully submitted, the court below might well have entered a decree which would eliminate the unconscionable waste of water by Appellees and enjoined their wasteful practices,[8] to the end that the invaluable water now wasted would be beneficially used. That grave need in itself fully justifies reversal.

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[5] Brief for the Appellant, United States of America, page 58.
[6] Brief of Appellees, page 59.
[7] Brief of Intervening Appellee, State of Washington, page 12.
[8] Brief of Appellees, page 59.

**IV. Intervener makes no mention of the fact that it was admitted to the Union and adopted its Constitution subject to this proviso: "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *"**

Intervener asserts: "The State of Washington, exercising its *jurisdiction* to adjudicate property rights of all persons within its boundaries adjudicated, limited and fixed the rights of all parties to the waters of Ahtanum Creek * * *.

"By this decree the United States was recognized to be the owner of 25 percent of the waters of said creek for the benefit of the owners of land on the reservation south of the creek."[9]

It is denied that the Intervener has "jurisdiction" in the Yakima Reservation or could adjudicate rights in that Reservation. Both the Constitution of the State of Washington and the Enabling Act provide that: "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *."[10] This Honorable Court involving the identical provision declared in these terms that State statutes respecting rights to the use of water did not apply within Indian Reservations: "* * * the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, 'shall remain

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[9] Brief of Intervening Appellee, State of Washington, page 14.
[10] Brief for the Appellant, United States of America, page 42.

under the absolute jurisdiction and control of the Congress of the United States'. 25 Stat. 676, sec. 4." [11]

In the light of that express decision by this Honorable Court, Intervener's assertion that the State of Washington had "jurisdiction" is clearly erroneous. Equally clear is the fact that as the United States of America reserved for itself, and was accorded by Washington, exclusive jurisdiction over the lands in question, there is no denial of the latter's sovereignty as is asserted.[12] Those same errors—reversible errors it is respectfully submitted—were made by the court below.

**V. Intervener ignores the decisions of its own highest court, the Nation's highest court and this Honorable Court when it declares that the United States of America is bound by a decree in a proceeding in which it did not appear**

It is admitted by all parties that the United States of America did not appear in the State court proceedings.[13] The mere reference to the unauthorized agreement of 1908 in the decision could not on any basis known to the law bind the United States of America. Certainly the Supreme Court of Washington has declared that parties who are not before a court in a water adjudication suit are not bound by the decree.[14] Though the Washington cases are referred to in the brief of the United States of America,

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[11] *United States et al.* v. *McIntire et al.*, 101 F. 2d 650, 654 (CA 9, 1939).

[12] Brief of Intervening Appellee, State of Washington, page 18.

[13] *In re Water Rights in Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758, 760 (1926).

[14] Brief for the Appellant, United States of America, page 55.

Intervener neither distinguishes them nor for that matter alludes to them. Under the circumstances, therefore, there is no basis whatever for asserting that the United States of America could be bound by a decree in the cause to which it was not a party.

Wholly aside from the fact that the United States of America did not appear in the case is this additional fact:

> The United States of America could not appear as it had not waived its sovereign immunity from suit.[15]

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[15] Please refer to Brief for the Appellant, United States of America, page 54.

## CONCLUSION

In the light of the numerous errors committed by the court below this Honorable Court is respectfully requested to reverse the judgment of dismissal and to direct the entry of a judgment in favor of the United States of America.

Respectfully submitted,

UNITED STATES OF AMERICA,

s/ J. Lee Rankin

J. LEE RANKIN,
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DAVID R. WARNER,
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